

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 12, 2007 Session

HERSCHEL BREWER, ET AL. v. JAMES BALL

**Direct Appeal from the Chancery Court for Rutherford County
No. 04-9875CV Royce Taylor, Judge**

No. M2006-02439-COA-R3-CV - Filed November 7, 2007

The trial court determined the statute of frauds operated to bar Defendant's counterclaim for damages arising from the breach of an alleged contract for the sale of real property. It further awarded Plaintiffs a return of deposit monies held by Defendant and prejudgment interest. We affirm as modified and remand.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as
Modified and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Mark A. Ellmore, Jr., Nashville, Tennessee, for the appellant, James Ball.

Randall W. Burton, Nashville, Tennessee, for the appellees, Herschel and Shirley Brewer.

OPINION

This dispute concerns a five-acre lot and home in Murfreesboro offered for sale by Defendant/Appellant James Ball (Mr. Ball) in 2003. In October 2003, Plaintiffs Herschel and Shirley Brewer ("the Brewers") and Mr. Ball discussed a potential purchase of the property by the Brewers for a purchase price of \$335,000. No written contract was executed, but the Brewers paid Mr. Ball \$5,000 in earnest money. According to the Brewers, the discussed sale was to be contingent on the sale of the Brewers' property, an inspection, and "other standard real property terms."

The Brewers sent Mr. Ball a proposed contract for sale in December 2003. In January and February 2004, the Brewers paid Mr. Ball additional \$5,000 payments as a downpayment. In March 2004, the Brewers' property sold and they met with Mr. Ball. Although no written contract had been executed, the Brewers paid an additional \$120,000 as downpayment/loan as requested by Mr. Ball, who was improving other property. The parties agreed to close on the Murfreesboro property in June. In March, the Brewers again sent Mr. Ball the proposed contract. Further, in May 2004, counsel for the Brewers informed counsel for Mr. Ball that the Brewers would not accept a contract

that did not include the right to an inspection and giving them the right to terminate the contract if the inspection results were not satisfactory. In the May letter, counsel for the Brewers stated that unless Mr. Ball agreed to the right to inspection of the property, the Brewers demanded immediate return of the \$135,000 deposited to Mr. Ball. In April 2004, Mr. Ball sent a signed revised contract to the Brewers. The counteroffer contained a clause which provided that if the contingencies proposed by the Brewers were not satisfied or waived by the Brewers, the \$135,000 paid by the Brewers as “earnest money” would be retained by Mr. Ball as “liquidated damages” for removing the property from the market. The contract did not include the right to an inspection. The Brewers did not sign the contract/counteroffer.

According to the Brewers, the parties agreed to a home inspection in June, but Mr. Ball ejected the inspector from the property before the inspection was complete. According to Mr. Ball, an inspection was not a contingency as reflected by a contract proposed by the Brewers in October. Ultimately, no contract was executed and the property was not transferred to the Brewers. On July 23, 2004, the Brewers demanded a refund of the \$135,000 deposited with Mr. Ball. Mr. Ball eventually sold the property to a third party in March 2005 at a purchase price of \$359,000.

In December 2004, the Brewers filed a complaint for damages and declaratory and injunctive relief in the Chancery Court of Rutherford County. In their complaint, the Brewers prayed the court for a decree declaring that no contract had been formed by the parties as no meeting of the minds had occurred. The Brewers prayed for return of the \$135,000 advanced to Mr. Ball. In the alternative, the Brewers prayed that if the court should determine a contract had been formed, that the court find Mr. Ball had breached the contract and for damages in the amount of \$135,000. Mr. Ball counterclaimed, alleging breach of contract, deceit, fraud, and seeking restitution. The Brewers answered Mr. Ball’s counterclaim, denying the allegations and raising as a defense, *inter alia*, the statute of frauds.

The hearing of this matter was commenced in May 2006 and, after an agreed continuance and rescheduling, was completed in September 2006. Following the September hearing, the trial court determined that no contract had been formed within the statute of frauds. It further determined that the contract proposed by Mr. Ball in April 2004 was unconscionable. The trial court awarded the Brewers return of \$134,610 as compensatory damages. The trial court also awarded the Brewers prejudgment interest in the amount of 10% per annum from April 18, 2004 to September 25, 2006 in the amount of \$32,844.84. The trial court entered its final order in this matter on October 12, 2006, and Mr. Ball filed a timely notice of appeal to this Court. We affirm judgment in favor of the Brewers, modify the award of prejudgment interest, and remand.

Issues Presented

The issues raised for our review, as presented by Mr. Ball, are:

- (1) The trial court erred in failing to recognize that the writings which supported the October 10, 2003 verbal agreement satisfied the statute of frauds.

- (2) The trial court erred in failing to recognize that the Brewers were equitably estopped from utilizing the statute of frauds as a bar to enforcement of the October 10, 2003 agreement.
- (3) The trial court erred in failing to recognize that the Brewers breached the October 10, 2003 agreement and this breach was the proximate cause of substantial financial loss for Ball.
- (4) The trial court erred in declaring that the October 10, 2003 contract was unconscionable based upon the proposed terms in [trial] exhibit 4.
- (5) The trial court erred in failing to recognize that the Brewers did not deal fairly and in good faith with Ball in their contract negotiation and performance.
- (6) The trial court erred in awarding the Brewers prejudgment interest on an uncertain, disputed claim.
- (7) The trial court erred in awarding the Brewers relief in excess of their pleaded claims.

Standard of Review

The determinative issue in this case, as we perceive it, is whether the parties executed an agreement or writing that would satisfy the statute of frauds applicable to the sale of real property. This is an issue of law which we review *de novo*, with no presumption of correctness attached to the determination of the trial court. *Cunningham v. Lester*, 138 S.W.3d 877, 879 (Tenn. Ct. App. 2003).

Analysis

We begin our analysis by noting that, as the trial court stated, the relevant facts in this case are largely undisputed. We thus turn to the trial court's determination that the statute of frauds operated to bar Mr. Ball's claim that the parties had entered into a valid contract for the sale of the real property. The statute of frauds provides, in pertinent part,

[n]o action shall be brought . . . [u]pon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year . . . unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party.

Tenn. Code Ann. § 29-2-101(a) (2000).

The purpose of the statute of frauds is to protect against unconsidered, indefinite agreements regarding the sale of real property. *Cunningham v. Lester*, 138 S.W.3d 877, 880 (Tenn. Ct. App. 2003)(citations omitted). The requirement that such agreements be in writing and signed by the person to be charged seeks to avoid misunderstandings about their terms and nature. *Id.* Historically, the courts of this State have held that, although the form of a writing is immaterial, to be enforceable under the statute of frauds a signed writing must express the essential terms of the agreement with a degree of certainty such that the agreement of the parties can be determined without recourse to parol evidence.¹ *Id.*

In this case, it is clear that the parties never executed a writing which would indicate a meeting of the minds. Mr. Ball did not sign the contract proposed by the Brewers, and Mr. Ball's counteroffer of April 2004 was undisputedly rejected by the Brewers. There simply is no writing signed by the Brewers with which to charge them. We agree with the trial court that there is no enforceable contract under the statute of frauds that would entitle Mr. Ball to retain the \$135,000 deposited with him by the Brewers.

We next turn to Mr. Ball's assertion that the Brewers should be equitably estopped from asserting the statute of frauds as a defense. Even if we were to agree with Mr. Ball's argument that the October 2003 agreement proposed by the Brewers represents a meeting of the minds with respect to the purchase price, there is nothing in that agreement that would entitle Mr. Ball to retain the \$135,000 deposit, less an "earnest money" deposit of \$5,000. It is undisputed, moreover, that Mr. Ball ultimately sold the property in March 2005 for a purchase price of \$359,000. This argument is without merit.

We likewise find Mr. Ball's argument that the trial court erred in not finding that the Brewers acted fraudulently or did not negotiate in good faith to be without merit. The Brewers undisputedly deposited \$135,000 with Mr. Ball without a signed written agreement. Additionally, they twice proposed a fairly standard real estate purchase contract which Mr. Ball refused to sign without significant alteration, including the requirement that the Brewers purchase the property "as is" or forfeit \$135,000 if the sale did not occur. This determination of good faith, moreover, is largely a matter of credibility. We review a trial court's determinations on matters of witness credibility with great deference. *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999). Accordingly, we will not re-evaluate these determinations unless they are contradicted by clear and convincing evidence. *Id.* Although the Brewers ultimately purchased another property, there is nothing in this record to demonstrate that the Brewers did not act in good faith when negotiating with Mr. Ball.

¹We note, however, that "in land contracts, once the grantor conveys the real estate, the buyer's return promise to pay for it becomes enforceable without reference to the statute of frauds; in that case the statute provides no defense to the buyer's failure to pay." *Vaughn v. King*, No. 01A01-9707-CV-00330, 1998 WL 205146, at *2, n.2 (Tenn. Ct. App. Apr. 29, 1998)(citing Restatement (Second) of Contracts § 125(3), cmt. e, illus. 11 (1981)).

We finally turn to Mr. Ball's assertion that the trial court erred by awarding the Brewers prejudgment interest. Mr. Ball asserts the trial court erred in awarding prejudgment interest "on an uncertain, disputed claim," and where the Brewers did not pray for it in their pleadings.

The purpose of prejudgment interest is not to punish a defendant, but to compensate the plaintiff for the loss of funds to which he or she was legally entitled. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). It is an award based foremost on equitable principles. *Id.* "Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case." *Id.* As Mr. Ball correctly notes, an award of prejudgment interest is within the discretion of the trial court, and the trial court's decision regarding the award will not be disturbed by this Court absent an abuse of discretion. *Id.* Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)(quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn.2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn.2000)). When reviewing a trial court's determinations under the abuse of discretion, the appellate court will not substitute its own judgment for that of the trial court, but will uphold the decision unless the trial court has applied an incorrect legal standard or reached a decision that is contrary to logic or reasoning and causes an injustice to the complaining party. *Id.*

In this case, we cannot agree that the Brewers' claim was uncertain or speculative. The Brewers sought the refund of \$135,000 undisputedly deposited with Mr. Ball in anticipation of and while negotiating for a signed, enforceable contract for the sale of real property. Although Mr. Ball disputes the right of the Brewers to recover this amount, the amount of recovery was not speculative in this case. Further, it is undisputed that Mr. Ball had use of these funds through entry of the trial court's judgment in this matter. However, the parties clearly continued to negotiate until June 2004, and the Brewers did not inform Mr. Ball of their intent to discontinue negotiations or demand a refund of the deposit until July 23, 2004. We accordingly modify the award to commence July 23, 2004. We next turn to whether the trial court erred in making the award where it was not prayed for in the pleadings.

The transcript included in the record reflects that the Brewers prayed for prejudgment interest when this matter was heard in the trial court, and Mr. Ball made no objection. We additionally note that Mr. Ball filed no Tennessee Rules of Civil Procedure Rule 59.04 motion to alter or amend the judgment in the trial court. We affirm the award of prejudgment interest as modified.

Holding

In light of the foregoing, we affirm the trial court's judgment in favor of the Brewers in the amount of \$134,610. We also affirm the trial court's award of prejudgment interest in the amount of 10% per annum, but modify the award to begin July 23, 2004 to September 25, 2006. We remand to the trial court for recalculation of prejudgment interest. Additional issues are pretermitted as

unnecessary in light of this Opinion. Costs of this appeal are taxed to the Appellant, James Ball, and his surety, for which execution may issue if necessary.

DAVID R. FARMER, JUDGE